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No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

WOMEN INVOLVED IN FARM ECONOMICS,
Petitioner,

v.

CLAYTON YEUTTER, SECRETARY OF AGRICULTURE,
AND UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

This case concerns a Department of Agriculture regulation that automatically treats a husband and wife as "one person" for purposes of their earning federal crop program payments. The district court invalidated this one-person rule under the Administrative Procedure Act and the United States Constitution. The court of appeals reversed. Of pertinence here, the appellate court held that, because the regulation was exempt from the APA's requirement of a contemporaneous explanation, judicial review into whether the rule is arbitrary and capricious need not include an inquiry into the reasonableness of the agency's decisionmaking process and can be based on the *post-hoc* rationalizations of the agency's litigation counsel.

The questions presented to this Court are:

1. Whether the arbitrary-and-capricious standard for judicial review of agency action can be discarded when the agency's action was not required to be accompanied by a contemporaneous explanation.

2. Whether a court reviewing the validity of agency action can rely on *post-hoc* rationalizations of agency counsel simply because the agency's action was not required to be accompanied by a contemporaneous explanation.

3. Whether a regulatory scheme that automatically classifies a husband and wife as "one person"—but permits all other categories of related or interdependent individuals and entities to establish that they are separate from each other—can be considered anything other than arbitrary and capricious.

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OPINIONS BELOW

The opinion of the court of appeals, reported at 876 F.2d 994, is reproduced in Appendix A, at 1a-27a. The memorandum opinion of the district court is reported at 682 F. Supp. 599 and is reproduced in Appendix C, at 30a-48a.

JURISDICTION

On June 2, 1989, the court of appeals entered its judgment reversing the district court. Appendix B, at 28a-29a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

The Fifth Amendment of the United States Constitution; Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988); Section 101 of the

Agricultural Act of 1970 (codified at 7 U.S.C. § 1308 (5)(A) (1988)); and the Department of Agriculture's one-person rule, 7 C.F.R. § 795.11 (1988), are set forth, respectively, in Appendices E, at 50a, F, at 51a, G, at 52a, H, at 53a, and J, at 62a.

STATEMENT OF THE CASE

1. The Agricultural Act of 1970, a comprehensive law authorizing a wide array of crop programs designed to support this country's farm economy and to facilitate government control over the supply of key agricultural commodities, was the first such statute to establish a dollar limitation on crop payments an individual "person" could earn annually. Pub. L. No. 91-524, § 101(1), 84 Stat. 1358. The 1970 Act further directed the Secretary of Agriculture to "issue regulations defining the term 'person' and prescribing such rules as he determines necessary to assure a fair and reasonable application of such limitation." *Id.*, § 101(4). Exactly eighteen days after the President's November 30, 1970, approval of this law, the Secretary of Agriculture issued implementing regulations in final form. 35 Fed. Reg. 19,339-41 (1970). For all categories of related or economically interdependent individuals or business entities except married couples, the regulations defined "person" in a manner permitting individual crop program participants to establish separate "person" status. *Id.* In the only departure from this general approach, the regulations provided that "[a] husband and wife shall be considered as one person." *Id.* at 19,340 (codified at 7 C.F.R. § 795.11 (1988)).

The record below is barren of any evidence as to why this one-person rule was promulgated. The Secretary did not seek comments, hold hearings, or attempt to explain his adoption of the rule. Prior to 1970, the Secretary had allowed farming husbands and wives to demonstrate the economic independence of their activities and thereby to qualify for individualized treatment. 31 Fed. Reg. 3487

(1966). The reasons the Secretary chose to adopt the more restrictive one-person rule in 1970 have never been disclosed.

Congress certainly did not call for such a draconian rule. The legislative history of the 1970 Agricultural Act reveals that, notwithstanding the statute's introduction of a payment limitation, the overwhelming Congressional sentiment, expressed in the official reports and the floor statements of the law's sponsors, was to encourage widespread participation in crop programs. *See* H.R. Rep. No. 1329, 91st Cong., 2d Sess. 16 (1970). As Representative Poage, Chairman of the House Agriculture Committee and Floor Manager of the bill, observed: "The whole success of the program is based on participation. . . . [W]e want participation, and we want it from everybody." 116 Cong. Rec. 27,452 (1970).[1] Although Congress did not want individual farmers to receive exorbitant payments, there is no indication in the statute or legislative history that the bill's proponents were concerned about preventing evasion of the newly-set payment limitation or wished to prevent farm couples from qualifying separately.

In fact, Congress rejected the one-person rule. A 1970 floor amendment, co-sponsored by Representatives Conte and Findley, would have required the Secretary of Agriculture to promulgate rules "to prevent the circumvention or evasion of [the payment] limitation." *Id.* at 27,141. In order to illustrate how the anti-evasion provision of his amendment—which Representative Conte called its "most important feature"—would be implemented if passed, Representative Conte placed into the *Congressional Record* draft regulations that included a rule ex-

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[1] *See also id.* at 27,132 (statement of Rep. Poage); *id.* at 27,134-35 (statement of Rep. Price); *id.* at 27,184 (statement of Rep. Montgomery); *id.* at 27,188-89 (statement of Rep. Abernathy); *id.* at 27,194 (statement of Rep. Rhodes); *id.* at 27,470 (statement of Rep. Foley).

plicitly treating a husband and wife as one "producer" for purposes of the payment limitation. *Id.* at 27,141-42. The Conte-Findley Amendment and a similar anti-evasion amendment in the Senate were both soundly defeated. *Id.* at 27,471, 31,793-94.[2]

After 1970, Congress repeatedly reenacted the statutory requirement that the Secretary promulgate "fair and reasonable" regulations respecting the per-person limitation without adopting provisions aimed at preventing circumvention or evasion of the payment limitation.[3] As in 1970, Congress rejected a number of anti-evasion measures in 1973, including one introduced by Representative Findley that would have required the Secretary to issue "efficient and economical" payment-limitation regulations instead of "fair and reasonable" ones. 119 Cong. Rec. 23,072 (1973). The House also rejected an amendment with a limitation identical in effect to the one-person rule, which would have applied a payment limitation to each "family farm unit," including a "spouse and issue." *Id.* at 23,972, 23,978.

The first serious Congressional emphasis on preventing payment-limitation evasion appeared in the recent Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. That Act contains detailed provisions intended to ensure that farmers cannot avoid payment

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[2] While the Secretary's one-person rule tracks language in the Conte-Findley draft regulations, key provisions of the 1970 regulations differ dramatically from the Conte-Findley draft. For example, Conte-Findley treated virtually all types of joint farming ventures and their venturers as one person; the 1970 regulations allow venturers to qualify separately. *Compare* 116 Cong. Rec. 27,142 *with* 35 Fed. Reg. 19,340.

[3] *See* Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, § 101(4), 87 Stat. 221; Food and Agricultural Act of 1977, Pub. L. No. 95-113, § 101(4), 91 Stat. 913; Agriculture and Food Act of 1981, Pub. L. No. 97-98, § 1101(5), 95 Stat. 1213; Food Security Act of 1985, Pub. L. No. 99-198, § 1001(5)(A)(ii), 99 Stat. 1354.

limitations through use of multiple corporate entities and other devices. *Id.*, § 1301-06. Although the 1987 Act reflects a concern over evasion that was absent in prior farm bills, it also specifically abrogates the one-person rule by providing that a husband and wife engaged in separate farm operations are to be treated as separate persons. *Id.*, § 1303(a)(2). The Secretary adopted this statutory provision in his new payment-limitation regulations, which became effective only with the 1989 crop season. 53 Fed. Reg. 29,576 (1988). That regulation is not at issue in this case.

2. Petitioner, a national non-profit organization of women involved in farming and agriculture, was founded in Sidney, Nebraska, in 1976. It filed this lawsuit to challenge the one-person rule in its original form and as it was to be applied through the 1988 crop season. Petitioner sought declaratory and injunctive relief aimed at invalidating the rule under the Administrative Procedure Act, 5 U.S.C. § 706 (1988), and the Fifth Amendment's equal protection and due process guarantees. Jurisdiction in the district court was premised on Sections 1331, 1346, 2201, and 2202 of Title 28 of the United States Code.

On March 31, 1988, the district court entered judgment permanently enjoining respondents "from refusing to allow husbands and wives to qualify as separate persons" for the purposes of the crop-program payment limitations. Appendix C, at 48a. The district court held that the one-person rule violated the APA's prohibitions on arbitrary and capricious agency action and action in excess of statutory authority. *Id.* at 43a-46a.[4] While fully acknowledging the limited scope of review and the

[4] In a holding that bolstered its APA ruling, the district court also invalidated the one-person rule under the Fifth Amendment, finding that it was an improper marriage-based classification. *Id.* at 43a. The district court expressly reserved the question of whether the rule was also unconstitutional on account of gender-based discrimination. *Id.*

deference ordinarily due an agency's decision, the district court ultimately concluded that, by categorically barring married couples from qualifying for separate crop payments, the one-person rule was "not consistent with the agency's statutory mandate to interpret the term 'person' fairly and reasonably in accordance with the congressional mandate to encourage participation in the farm crop subsidy program." *Id.* at 46a.

Relying on this Court's clear precedent, the district court also criticized the agency's decisionmaking process, specifically "its failure to 'cogently explain why it has exercised its discretion in a given matter.'" *Id.* at 45a (citing *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)). The district court pointed to respondents' failure to "submit[] any administrative record indicating what deliberations prompted the Secretary to promulgate the husband-wife rule" and to the fact that, instead, the Secretary had only "offer[ed] the current rationalizations for the rule as well as a questionable estimate of the cost to the government if the rule were abolished" in 1988. Appendix C, at 45a. The court found these *post-hoc* rationalizations to be "entirely unpersuasive." *Id.*

On appeal, the D.C. Circuit reversed. Central to its rejection of petitioner's APA claim was the panel's formulation of the issue as being limited to whether the rule "is a legitimate interpretation of the statute." Appendix A, at 7a. In thus narrowly framing the question, the panel declined to conduct the usual inquiry, required by numerous decisions of this Court, to determine whether the agency's original decision was abritrary and capricious.

The panel openly acknowledged that its highly deferential review of the one-person rule would have "implications that go far beyond this case." *Id.* at 8a. It justified its relaxed standard of review by observing that promul-

gation of the one-person rule in 1970 was not subject to the procedural guidelines of Section 553, including its requirement of a contemporaneous explanation of proposed agency action. *Id.* The panel reasoned that in the absence of such procedural requirements under Section 553, it could not find reliable enough indications of the agency's reasoning to carry out the arbitrary-and-capricious review standard of Section 706(2)(A). Appendix A, at 9a-10a.

This premise led the lower court to conclude that it could rely on agency defenses not ordinarily deemed permissible in such review proceedings. In particular, the lower court held that it could freely rely on the *post-hoc* rationalizations and explanations offered by the agency's litigation counsel, which attempted to justify the rule on the basis of current notions of administrative ease and economy. *Id.* at 9a-13a, 15a-17a. On the basis of these and related considerations, the panel rejected petitioner's APA challenge.

REASONS FOR GRANTING THE PETITION

Without a shred of support from the text of the Administrative Procedure Act or the rulings of this Court, the lower court has created a new and highly deferential standard for reviewing the validity of numerous categories of agency action that are not subject to the contemporaneous explanation requirement of the APA. In creating this unprecedented lower-tier standard of review —which eliminates any real inquiry into the reasonableness of an agency's decisionmaking process and permits primary reliance on *post-hoc* rationalizations of agency counsel—the panel below has defied explicit rulings of this Court and has ignored clear holdings in its own and several other circuits. The relaxed standard of appellate review created below, if left uncorrected, would encourage agencies to avoid this Court's requirements for reasoned and responsible administrative decisionmaking and would

insulate important categories of agency action from meaningful judicial review. Accordingly, and also in light of the archaic and irrational nature of the agency rule under consideration, a writ of certiorari should issue.

I. THE APPELLATE COURT'S REFUSAL TO EXAMINE THE REASONABLENESS OF AGENCY DECISIONMAKING IN THE COURSE OF ARBITRARY-AND-CAPRICIOUS REVIEW VIOLATES THIS COURT'S UNAMBIGUOUS PRECEDENTS AND CLASHES WITH THE HOLDINGS OF OTHER CIRCUIT COURTS.

Frankly conceding that its ruling "has implications that go far beyond this case," Appendix A, at 8a, the panel below sustained the challenged regulation notwithstanding the absence of any evidence shedding light on the agency's original decision. Rather than addressing the Secretary's actual decisionmaking process or requiring the submission of evidence relating to that process, the court merely sought to satisfy itself that the one-person rule was "a legitimate interpretation of the statute." *Id.* at 7a. In thus abdicating its obligation to undertake a searching analysis of whether the agency engaged in reasoned decisionmaking, the panel ignored plain rulings of this Court and created a sharp conflict with numerous other circuits.

The pretext seized upon by the lower court to justify this new, relaxed standard was the fact that the agency's 1970 rulemaking was exempt from the APA's contemporaneous explanation requirement set forth in Section 553(b), 5 U.S.C. § 553(b). While the panel conceded that "an exemption from [S]ection 553 does not insulate a rule from substantive judicial review" under the arbitrary-and-capricious standard of Section 706, Appendix A, at 8a, it did not insist on an explanation for the rule grounded in the realities of 1970. In so ruling, the panel thus refused to consider—as Section 706 plainly requires—whether the rule was the product of reasoned decisionmaking and instead merely focused on whether the rule

was, in hindsight, "a legitimate interpretation of the statute." Appendix A, at 7a. Such an approach is in conflict with the explicit commands of this Court and numerous circuit courts, both in cases generally articulating the appropriate standard of review under Section 706 and in cases where the agency action being reviewed under Section 706 was exempt from particular APA procedural requirements, such as those of Section 553.

The standard for review of agency action under Section 706 is clear. This Court has unambiguously required that, in determining whether agency action is arbitrary and capricious, a reviewing court must determine

> "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Only through such review can the court determine whether the agency's "decision was based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). This Court's decisions thus *require* reviewing courts to engage in a "searching and careful" inquiry, *id.*, so that they can determine whether the agency's result was "the product of reasoned decisionmaking," *Motor Vehicle*, 463 U.S. at 52.[5]

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[5] *See also Mobil Oil Corp.* v. *Department of Energy*, 610 F.2d 796, 801 (Temp. Emer. Ct. App. 1979) ("The standard of review of agency action alleged to be arbitrary and capricious is not simply whether there exists a rational basis for the action. Rather . . . the inquiry is 'whether the decision was based on a consideration of relevant factors, whether there has been a clear error of judgment and whether there is a rational basis for the conclusions approved by the administrative body.' "), *cert. denied*, 446 U.S. 937 (1980); *accord Kennecott* v. *EPA*, 780 F.2d 445, 449 (4th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986); *United States* v. *Garner*,

These requirements are no less applicable in situations where the agency is exempt from the provisions of Section 553. *Overton Park* itself involved judicial review of action not subject to APA procedural requirements, in that instance an informal adjudication by the Secretary of Transportation. Yet the Court remanded to the district court with instructions that it determine the actual basis for the Secretary's action. 401 U.S. at 420.

The irrelevance of procedural requirements to the purpose of arbitrary-and-capricious review was reconfirmed in *Camp* v. *Pitts*, 411 U.S. 138 (1973) (per curiam), where the Court established procedures to be used by reviewing courts when an agency has not said enough to "provide an adequate basis for judicial review." *Id.* at 138. This Court held that the objective of a reviewing court must nevertheless be to apply Section 706's requirements, not some lesser standard, to "the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* at 142. Even where the agency action is exempt from procedural requirements such as those of Section 553, the focus during judicial review must include the reasonableness of the decisionmaking process and not simply the rationality of the agency's final action.

The Fifth Circuit, in a recent decision directly in conflict with that below, explicity held that judicial review of rulemaking exempt from Section 553 still must encompass the reasonableness of the agency's decisionmaking process. *United States* v. *Garner*, 767 F.2d 104, 118 (5th Cir. 1985). The *Garner* court ruled that "even when the APA does not require the agency to incorporate in the rule a general concise statement of its basis and purpose, the agency's failure to demonstrate that the rule is the product of reasoned decisionmaking renders it

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767 F.2d 104, 116 (5th Cir. 1985); *International Bhd. of Teamsters* v. *United States*, 735 F.2d 1525, 1531 (D.C. Cir. 1984); *ILGWU* v. *Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983).

invalid under the arbitrary and capricious standard." *Id.* (citing *Overton Park*, 401 U.S. at 419-20).[6]

The express terms of the APA, repeatedly reinforced by this Court, required the lower court here to scrutinize the actual process by which the Secretary decided in 1970 to adopt the one-person rule. The panel below utterly failed to perform that inquiry. Especially in light of the 18-day gap between passage of the statute and issuance of the rule, the Secretary's unexplained abandonment of the agency's prior treatment of married farm couples, and the potentially suspect nature of marital classifications, the court should have seen the need for a particularly aggressive inquiry into the basis for the original decision. Instead, the panel undertook a narrow substantive review of the agency's policy choice, weighing only whether the choice was permissible and relying almost exclusively on a highly suspect interpretation of Congressional intent.

Rather than demand a factual reckoning by the agency of its 1970 deliberations,[7] the panel below resorted to free-wheeling and unseemly speculation about those deliberations. Noting that the agency's 1970 regulations bear a "strong resemblance" to the draft regulations that accompanied the Conte-Findley Amendment, the panel "imputed to the Secretary" and to Congress as a whole the anti-evasion concerns expressed during the floor debate

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[6] While *Garner* was—as its citation to *Overton Park* reveals and as the holding of this Court in *Camp* v. *Pitts* confirms—correctly decided, the panel's ruling below, together with similar holdings in two other circuits, *see Bedford County Gen. Hosp.* v. *Heckler*, 757 F.2d 87, 90-91 (6th Cir. 1985); *Holy Cross Hosp.-Mission Hills* v. *Heckler*, 749 F.2d 1340, 1346 (9th Cir. 1984), has exacerbated a stark conflict among the circuits on this precise point.

[7] Respondents have never established that they are unable to provide any witnesses and documents bearing on the 1970 decision-making process.

of that rejected amendment. Appendix A, at 13a, 18a-19a. The obvious problem with this imputation is that the 1970 legislative history reveals a lack of concern about evasion, as particularly evidenced by the decisive defeat of the Conte-Findley Amendment. In imputing the Conte-Findley concerns to the Secretary and to Congress as a whole, the panel ignored the well-established rule that the rejection of an amendment is, if anything, strong evidence that Congress *did not intend* the result sought by the sponsors of the amendment. *See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 198-99 (1913); 2A N. Singer, *Statutes and Statutory Construction* § 48.18 (4th ed. 1984); Willard & MacDonald, *The Effect of an Unsuccessful Attempt to Amend a Statute*, 44 Cornell L.Q. 336, 341-43 (1958) (citing numerous cases).[8] In any case, Section 706 of the APA required the Secretary to engage in a reasoned decisionmaking process and to consider the options available to him, not blindly to accept the suggestion of Congressmen who failed to convert their colleagues.

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[8] In a textbook example of why resort to legislative history is increasingly subject to criticism, the panel below speculated that the reason for the amendment's defeat was not because of its anti-evasion language. Appendix A, at 18a-19a. Such guesswork is of course entirely inappropriate. Moreover, the panel's guess was surely wrong, inasmuch as it ignored Representative Conte's own admission that the anti-evasion provision in his amendment was its "most important feature." 116 Cong. Rec. 27,141 (1970). This Court and lower courts should not abide the efforts of a legislator on the losing side, in Representative Conte's own words, "to establish a legislative history." *Id.*

Reliance on a defeated floor amendment was not the panel's only misuse of legislative history. Its attempts to suggest that Congress subsequently ratified the one-person rule are flatly contrary to the evidence, which in fact points in the other direction. *See* pages 4 to 5, above.

This Court has never withdrawn its requirement that the arbitrary-and-capricious standard requires reviewing courts to conduct a searching evaluation of agency decisionmaking. Only such an evaluation can satisfy the requirements of Section 706. The relaxed standard the panel below created for agency conduct exempt from the contemporaneous-explanation requirement of Section 553 is not authorized by the APA and conflicts with decisions of this Court and the circuit courts. A writ should issue to eliminate the conflict created by the panel's decision.

II. THE APPELLATE COURT'S RELIANCE ON *POST-HOC* RATIONALIZATIONS OF COUNSEL SQUARELY CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

The court of appeals openly admitted that, in determining whether the Secretary's action met the panel's bare legitimacy test, it relied "on counsel's explanations" conceived and proffered almost twenty years after the agency acted. Appendix A, at 9a. By embracing lawyer's argument, the court jettisoned the previously unquestioned rule, repeatedly articulated in decisions of this Court and the circuit courts, that courts reviewing agency action cannot rely on *post-hoc* rationalizations as substitutes for the agency's own reasoning. This unprecedented departure largely foreclosed judicial assessment of the adequacy of the Secretary's original reasoning process and, if applied prospectively, would give agency counsel the opportunity to mask or distort the true reasons for agency action.

The court below acknowledged that this Court

> "has repeatedly insisted that at least when an agency had an obligation to explain its action contemporaneously with the action, *post-hoc* rationalizations of counsel may not be relied upon by a reviewing court."

Id. at 10a. Citing no authority, however, the court below then decided that the usual prohibition need not apply

where the agency was exempt from the explanation requirement. *Id.* To put the matter baldly, the court decided that where the agency's rationale must be resurrected after the fact anyway, the story concocted by the lawyers is as good as any other. *Id.* at 11a.[9]

The problem over which the court stumbled into error was not new or unique. The leading decision establishing the parameters of judicial review, *Overton Park*, was itself a case involving informal agency action exempt from APA requirements. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420-21 (1971). In that decision, however, the Court rejected reliance on " '*post hoc*' rationalizations" because they do not constitute the "administrative record that was before the Secretary at the time he made his decision." *Id.* at 419-20.[10]

Similarly, in *Camp* v. *Pitts*, 411 U.S. 138 (1973), the Court made clear that the absence of a contemporaneous explanation requirement does not open the door to the *post-hoc* explanations of "some new record made initially in the reviewing court." *Id.* at 142. If the record is silent, as here, the reviewing court should either remand to the agency or "obtain from the *agency*, either through affidavits or testimony, such additional explanation of the

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[9] Obviously, the reviewing court's task was made no easier in this case by the fact that the Secretary acted a scant 18 days after passage of the statute without any form of public notice, comment, or discussion. That barren record ought reasonably to have required *more* attention to the original decision, not less.

[10] The lower court's error may have been inadvertent, as indicated by this passage:

> "We are thus aware of no case in which the Supreme Court has applied *Chenery's* proscription against crediting counsel's explanations to the review of agency action exempt from the APA's requirement of a contemporaneous explanation of the action's basis or purpose."

Appendix A, at 11a (referring to *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)). *Overton Park*, cited by the panel, was such a case.

reasons for the agency decision as may prove necessary." *Id.* at 143 (emphasis added). *See also Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 337-38 (D.C. Cir. 1989).[11]

The instructions in *Camp* merely refine this Court's longstanding requirement that agency action be reviewed on the basis of what the agency did, not what the agency or its counsel later thinks that it might have done. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94-95 (1943). Even when agency action is exempt from APA requirements, a reviewing court cannot discharge its function of determining whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" by relying on subsequent rationalizations. *Overton Park*, 401 U.S. at 416, 420.[12] *Post-hoc* rationalizations by counsel have, of course, long been viewed as especially suspect. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962).

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[11] To be sure, an agency cannot be compelled by a reviewing court to adopt procedures inconsistent with those Congress has selected. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978). That does not mean, however, that the agency's decision ceases to be the focus of appellate review.

[12] The panel's error also may be attributable to its failure to respect all the objectives of the *Chenery* rule. The panel seems to have viewed *Chenery* as serving only one purpose: ensuring that the agency rather than the judiciary supplies the reasons for issuing a rule. Appendix A, at 12a. But *Chenery* serves another function as well, which is to require the courts to review the decisionmaking process of the agency, not the creativity of appellate counsel. As this Court emphasized in *Massachusetts Trustees of Eastern Gas & Fuel Assoc.* v. *United States*, 377 U.S. 235 (1964):

> "These [*Chenery*-type] cases are aimed at assuring that initial administrative determinations are made with relevant criteria in mind and in a proper procedural manner."

Id. at 248.

Decisions of other circuits and, indeed, other decisions of the D.C. Circuit have followed the Court's guidance, in sharp contrast to the panel decision. In *United States* v. *Garner*, 767 F.2d 104 (5th Cir. 1985), a case based on agency action exempt under Section 553(a), the court flatly rejected explanations offered by counsel, declaring that such explanations "are simply an inadequate basis for the exercise of substantive review of an administrative decision." *Id.* at 117. *See also Bradley* v. *Weinberger*, 483 F.2d 410, 414-15 (1st Cir. 1973) (rejecting *post-hoc* arguments not considered by agency). In prior decisions of the D.C. Circuit, neither mentioned nor expressly overruled in the opinion below, the court had reached the same conclusion. *See, e.g., Getty* v. *FSLIC*, 805 F.2d 1050, 1057 n.10 (D.C. Cir. 1986).

The D.C. Circuit had previously recognized, as *Camp* teaches, that an administrative record could be supplemented only to explore the *original* rationale for the decision, not to introduce "findings [that] might have been made." *Chenery*, 318 U.S. at 94. As the D.C. Circuit explained in *AT&T Information Sys., Inc.* v. *GSA*, 810 F.2d 1233 (D.C. Cir. 1987):

> "Although the record may be supplemented to provide, for example, background information or evidence of whether all relevant factors were examined by an agency, we have made clear that '*[t]he new material should be merely explanatory of the original record and should contain no new rationalizations.*'"

Id. at 1236 (citations omitted) (emphasis added). The court failed to abide by that restriction here.

The *post-hoc* rationalizations on which the decision rests plainly reveal that the court reviewed the 1989-vintage arguments of counsel and not the 1970-era reasoning of the Secretary. These arguments include a highly questionable estimate of the current cost of eliminating the one-person rule, which manifestly was not before the agency when the rule was adopted. Similarly,

counsel drew on the agency's experiences since 1970 with other more discriminating regulations—experiences unknown to the agency when the one-person rule was adopted.

With respect, the appellate court's attempts to bolster its reliance on counsel's representations border on frivolous. First, the panel suggested that the Department's attorneys might have better knowledge than anyone else concerning the original reasoning underlying the rule. Appendix A, at 11a. This assertion was especially remarkable, because the Department was not represented by agency counsel, but by the U.S. Attorney's Office. Although we have ample reason in this case to respect the abilities of our opposing counsel, there is no reason to believe that they have any more knowledge about the considerations underlying the 1970 regulation than do we or any other outsiders.[13] Second, the court relied again on the rejected Conte-Findley Amendment, which as we have shown (*see* pages 11 to 12, above) undercuts the one-person rule. Finally, the court indicated that passage of time may make reliance on counsel's representations more appropriate, but its concerns about the inadequacy of recollection of 1970 events were mere speculation.[14]

Counsel's after-the-fact arguments may or may not have paralleled the agency's reasoning in 1970. The Secretary's predecessor may have been convinced, as counsel now assert, that any alternative to the one-person rule

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[13] The fact that government lawyers may have made similar *post-hoc* arguments in *Martin* v. *Bergland*, 639 F.2d 647 (10th Cir. 1981), is of no consequence. Moreover, as the panel below conceded, that decision "involved only a constitutional challenge" to the one-person rule. Appendix A, at 12a n.4.

[14] The court despaired of seeking the views of the current Secretary, who was not in office in 1970. It ignored the possibilities, however, that the agency still employs key decisionmakers from 1970 or that "the administrative officials who participated in the decision [could] give testimony explaining their action." *Overton Park*, 401 U.S. at 420.

would have been impossible to apply; or he may instead have been burdened by improper preconceptions about women farmers that caused him to underestimate their ability to make significant and independent contributions to agricultural endeavors. The crucial defect in the approach taken below, however, is that it left the original decision unexplored and this and other uncertainties unresolved. It shifted the focus from "the administrative record already in existence" (*Camp*, 411 U.S. at 142) to counsel's ingenuity during litigation. The court therefore abdicated meaningful judicial review of the agency's original decision.

Because the appellate panel's decision disobeyed clear directives from this Court and conflicts not only with decisions of other circuits but also with other decisions of the D.C. Circuit, a writ should issue.

III. THE APPELLATE COURT'S FAILURE TO RECOGNIZE THAT LEGAL RULES CONCLUSIVELY TREATING A HUSBAND AND WIFE AS "ONE PERSON" ARE INHERENTLY IRRATIONAL IS INCONSISTENT WITH THIS COURT'S PRECEDENT.

The lower court was not troubled by the potential for unfairness and indeed the irrationality of the one-person rule, which creates an automatic and irrebutable presumption that a husband and wife are "one person." No other category of related natural persons—siblings, parents and minor children, unmarried couples living together, and financially interdependent partners—is singled out for similar treatment by the regulations. Given the total absence of any support for such a categorical rule in the legislative history, its patent unfairness, and the presence of alternative approaches, the one-person rule is arbitrary and capricious.

The one modern case of this Court of which we are aware that analyzes a legal rule treating a husband and wife as one person buttresses this conclusion. In *United*

States v. *Dege*, 364 U.S. 51 (1960), the Court invalidated such a rule in the context of husband-wife conspiracies. Justice Frankfurter, having reviewed the sexist common-law background of marital presumptions, wrote for the Court that such rules reflect "medieval views," "enthrone an unreality into a rule of law," are "unnourished by sense," are "offensive to the ethos of our society," and recall "self-deluding romanticism." 364 U.S. at 52-54.[15]

In sum, the one-person rule is irrational and, by any measure, both arbitrary and capricious.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ should issue granting review of the questions presented.

Respectfully submitted,

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[15] *See also Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("[T]he marital couple is . . . an association of two individuals with a separate intellectual and emotional makeup."); *Commonwealth* v. *Lawson*, 309 A.2d 391, 396 (Pa. 1973) ("There is no reason to perpetuate the fiction that husband and wife are one person with one will in the eyes of the law. They are not."); *Richard* v. *Richard*, 300 A.2d 637, 641 (Vt. 1973) (We "reject the archaic principle that husband and wife are 'one person.' ").